

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee,)
LLC, and Entergy Nuclear Operations, Inc., for)
amendment of their Certificates of Public Good)
and other approvals required under 10 V.S.A.)
§§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 &)
254, for authority to continue after March 21,)
2012, operation of the Vermont Yankee Nuclear)
Power Station, including the storage of spent-)
nuclear fuel)

Order entered: 2/5/2009

ORDER RE: MOTION TO COMPEL

I. INTRODUCTION

On February 2, 2009, the New England Coalition ("NEC") filed a Motion for Clarification, to Compel Discovery, and to Alter the Schedule in this proceeding. NEC asks that we require Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. ("Entergy") to respond to discovery requests related to the reliability of the Vermont Yankee Nuclear Power Station ("Vermont Yankee"). In addition, NEC requests that we extend the schedule for two weeks to take account of the several versions of the Reliability Assessment filed by the Department of Public Service ("Department") on December 22, 2008, and supplemented on January 17, 2009. The Vermont Public Interest Research Group ("VPIRG") and the Conservation Law Foundation ("CLF") support NEC's motion. Entergy opposes the motion, arguing that NEC has failed to comply with the applicable rules for filing a motion to compel, that it has provided appropriate discovery responses, and that NEC has had access to the full Reliability Assessment since December so that it does not need additional time.

In this Order, the Vermont Public Service Board ("Board") denies NEC's request that we compel discovery. Under the Board's rules of practice (Rule 2.214 and by incorporation

V.R.C.P. 26(h) which governs motions to compel), parties that file a motion to compel must comply with certain procedural requirements. In this instance, NEC did not so comply and has not even identified the specific discovery responses that it seeks to have Entergy answer. We also deny NEC's request for a two-week extension of the February 6, 2009, deadline for NEC, the Department, and other Intervenors to file testimony. Instead, we will modify the schedule to extend the deadline until noon on February 11, 2009. Entergy's period for discovery on this testimony is extended by a similar five days, but the remainder of the schedule is left unchanged.

II. MOTION TO CLARIFY AND COMPEL

NEC argues that, while it views the reliability of Vermont Yankee as an important element of the Board's relicensing decision, Entergy "has categorically objected to NEC Information Requests regarding the condition and maintenance of selected plant systems, structures, and components that could affect plant reliability."¹ NEC asserts that Entergy has repeatedly objected to the provision of information related to reliability, citing as a basis the Vermont General Assembly's assertion of authority as evidenced by Act 189 (2007 Adj. Sess.). NEC contends that discovery solely on the Reliability Assessment is not adequate to address reliability concerns as there are concerns that extend beyond what it characterizes as the "narrow scope of this report." NEC argues that Entergy's objection to the provision of information related to reliability is unfounded and asks that we (1) clarify the role of reliability in these proceedings and (2) compel Energy to make full and complete disclosure with respect to all of NEC's information requests to which Entergy has issued the generalized objection.

Entergy responds that NEC's motion is procedurally defective and, even if considered on its merits, is unfounded. Entergy asserts that NEC has failed to comply with V.R.C.P. 26(h), which is a prerequisite to filing a motion to compel. According to Entergy, NEC did not attempt to resolve the dispute in advance of the filing, NEC's counsel did not file an affidavit specifying its efforts to resolve the dispute, and NEC did not delineate specifically the items of discovery sought and why the item should be allowed or disallowed, all as required by Rule 26(h). On the merits, Entergy maintains that, even where it raised the general objection to providing

1. NEC Motion at 2.

information related to reliability, "it nonetheless produced all documents requested unless objectionable for some other reason."² Entergy argues that it also provided all material that it had provided in the context of the Reliability Assessment. As to NEC's request that we clarify the scope of the proceeding as it pertains to reliability, Entergy contends that we do not need to resolve the issue because NEC's motion to compel must be denied for the other reasons asserted by Entergy (although Entergy asks for an opportunity to brief its response if we elect to decide the issue).

CLF argues that NEC should be able to present its case that the reliability of Vermont Yankee is a factor to be considered in our review under Section 248. CLF maintains that it is inappropriate for Entergy to unilaterally limit the scope of discovery. VPIRG contends that the Board is not precluded from considering the reliability of Vermont Yankee in this proceeding (citing a prior Board decision finding it relevant to the economic benefit criterion).

We deny NEC's motion because NEC failed to comply with the procedural requirements of Rule 26(h). Board Rule 2.214 adopts Rule 26 of the Vermont Rules of Civil Procedure. Rule 26(h) requires that, prior to filing a motion to compel, the party seeking discovery must attempt to resolve the dispute through good-faith negotiations. In addition, at the time it files its motion, the moving party must file an affidavit from its counsel specifying the attempts to resolve the dispute and explaining the areas of agreement and disagreement. We have consistently denied motions to compel when a party failed to comply with these requirements.³ Here, NEC has provided no information related to its attempts to resolve the discovery report, nor has it provided an affidavit explaining any negotiation efforts or the areas of disagreement. We find this particularly egregious since it was clear at the time of the October 1, 2008, status conference that Entergy was raising questions about the scope of discovery on issues related to reliability.⁴

NEC also has failed to identify with any specificity the discovery questions that it seeks to have us compel Entergy to answer, as required by Rule 26(h). Not only is this a procedural

2. Entergy Response at 8.

3. *E.g., Amended Petition of Deerfield Wind, LLC, for a Certificate of Public Good*, Docket 7250, Order of 8/25/08 at 2–3.

4. Tr. 10/1/08 at 9–10 (Boucher), 17–19 (Marshall).

defect, but where, as here, Entergy asserts that it has not actually withheld any information on the basis of the complained-of objection, the Board is left with no means to assess the merits of NEC's claim that it has been wrongly denied discovery. Put simply, based upon NEC's motion, even if we were inclined to grant the motion, we have no idea which information requests we should be requiring Entergy to answer. This is unacceptable.

Accordingly, NEC's motion is denied.

Because we find NEC's motion to be procedurally defective, we do not need to rule on its motion to clarify the scope of the proceeding. All parties should submit testimony on the issues, including reliability, that they consider to be within the scope of Section 248 of Title 30 and Chapter 157 of Title 10. If any party files a timely objection to the admission of testimony as being outside the scope of our authority, we will resolve the issue at that time.

III. MODIFICATION TO SCHEDULE

NEC also asks that we modify the schedule to this proceeding by extending the date by which it must file its initial testimony (February 6, 2009) by two weeks. The Board's schedule required the Department to file the Reliability Assessment performed in compliance with Act 189 (2007 Adj. Sess.) by December 22, 2008. According to NEC, when the Department filed the Reliability Assessment on that date, a large portion of the material was redacted. As a result, because NEC's experts had not signed the Protective Agreement that we had previously approved in this proceeding, NEC asserts that its witnesses did not have access to the information. NEC contends that, although the Department (after working with Entergy) subsequently released a substantial amount of the redacted material, that did not occur until nearly a month later, when it was filed on January 15, 2009. This late availability of material, which NEC contends should not have been withheld in the first place, left NEC with inadequate time to conduct discovery and prepare testimony.

Entergy argues that NEC has shown no basis for an extension. Entergy maintains that NEC has had months to prepare discovery related to the reliability of Vermont Yankee and that NEC has done so. In addition, Entergy states that it voluntarily disclosed (beginning

December 22, 2008) the documents that it had provided in the context of the Reliability Assessment. As to NEC's assertion that it did not have access to the full report, Entergy asserts that the unredacted version was made available to NEC's counsel on time and that the only reason NEC's witnesses had not seen it was their decision not to sign the Protective Agreement until January 7, 2009, and not to provide those signed agreements to Entergy until January 12, 2009.

The Department echoes Entergy's comments that NEC had full access to the unredacted version of the Reliability Assessment on December 22, 2008, so that any delay was associated with the choice of NEC's witness not to sign the Protective Agreement.

Both VPIRG and CLF consent to NEC's request for additional time.

We are not persuaded that a two-week extension of the deadline for filing testimony is appropriate. NEC's delay in being able to review the portions of the Reliability Assessment that were originally claimed confidential resulted from the choice its witness made not to sign the Protective Agreement, not from any other reason. NEC is an experienced party that has appeared in all significant proceedings related to Vermont Yankee in this decade; as a result, it is well aware that some relevant information would likely be treated as Allegedly Confidential, thereby requiring that its experts sign the Protective Agreement if NEC desired that they have access to that information. It elected not to sign and must now accept the consequences of that choice. Moreover, NEC has not shown that Entergy has inappropriately withheld information.

Nonetheless, we do grant a short extension of time, until February 11, 2009, at noon, for parties to file their testimony. The period for discovery upon other parties (now set to end March 2) is extended by a similar period until March 6, 2009. The remainder of the schedule is unchanged.

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of February, 2009.

s/James Volz)

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PUBLIC SERVICE

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s/David C. Coen)

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BOARD

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OF VERMONT

s/John D. Burke)

OFFICE OF THE CLERK

FILED: February 5, 2009

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)